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BRIEF FOR APPELLANTS

Sir:

This is a Brief on Appeal from the Examiner's Final Rejection concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; C.F.R. §1.136.

BRIEF FOR APPELLANTS

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I. REAL PARTY IN INTEREST

The Real Party in Interest in this Appeal is Unilever Bestfoods, North America, Division of Conopco, Inc., a corporation of the State of New York.

II. RELATED APPEALS AND INTERFERENCES

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

III. STATUS OF CLAIMS

This Appeal is taken from the Final Rejection of claims 1, 3, 4, 8 through 17, 19 through 23, and 25, the pending claims in the application. A copy of the appealed claims is attached to this Brief as an Appendix.

IV. STATUS OF AMENDMENTS

A Reply after the Final Rejection had been filed on July 23, 2007, which was a request for reconsideration with no claim amendments.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The invention set forth in the claims on appeal is directed to a superior edible *oil-in-water* emulsion, a method for making the edible emulsion and a food product comprising the edible emulsion having less than 85 % oil. The edible emulsion comprises, among other things, insoluble fibers and specifically 0.5 to 12% by weight emulsifier comprising a viscosity-building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of less than or equal to 5.5, or a viscosity-building emulsifier that is at least about 50% by weight protein, or both. The viscosity-building emulsifier makes up from 0.1 to 4.0% by weight of the edible emulsion, with the proviso that when chemical emulsifier is used, *less chemical emulsifier is used than viscosity-building emulsifier*. The reduced oil food products made with the edible emulsion have consumer acceptable appearances, viscosities and texture, as well as sensorial properties consistent with full fat products.

Furthermore, the food products made with the edible emulsion comprising insoluble fiber, thickener and viscosity-building emulsifier of this invention have, in addition to excellent texture and sensorial properties, the added health benefit associated with food products containing fiber. Insoluble fiber, according to the present invention, means fiber that is not water soluble whereby, when the same is supplied as an additive composition, the additive composition is not more than 50 % by weight soluble fiber, based on total weight of soluble and insoluble fiber in the additive composition.

In the Specification, the portion from page 1, line 17 to page 3, line 18 is background. The phraseology used in claim 1 may be found, for example, on pages 3-5 of the Specification as originally filed. Beginning at page 15, line 1, working examples, illustrating the unexpected results and superior properties of the composition and food products of this invention, are put forth. As shown in Examples 1 and in the Specification (beginning on p. 15, line 1 +), the claimed low oil products unexpectedly display rheological properties similar to full fat products while they unexpectedly look,

taste, and have a mouthfeel similar to that of full fat products, which inventive low fat oil products are superior when compared to conventional like low oil compositions.

Independent claim 1 describes an edible emulsion comprising:

- a) less than about 85.0% by weight oil;
- b) water;
- c) about 0.5 to about 12.0 % by weight emulsifier comprising a viscosity-building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of ≤ 5.5 or a viscosity-building emulsifier that is at least about 50.0% by weight protein, or both;
- d) about 0.1 to about 1.0% by weight insoluble fibers; wherein the insoluble fibers are citrus or non-citrus; and
- e) thickener

wherein the edible emulsion is coarse or smooth oil-in-water emulsion ; and further wherein said viscosity building emulsifier makes up about 0.1 to about 4.0 percent by weight of the edible emulsion, with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier.

The invention of claim 1 is further defined by the dependent claims which claim, among other things, the type and amount of oil ingredient, the amount and HLB of emulsifiers in mixture, the type of emulsion and droplet size thereof, and the type of thickener or mixtures.

Independent claim 14 is directed to a method for making an edible emulsion comprising insoluble fibers comprising the steps:

- a) mixing, in no particular order,
 - less than about 85.0% by weight oil,
 - water,
 - insoluble fiber, wherein the insoluble fibers are citrus or non-citrus;
 - thickener and

about 0.5 to about 12.0 % by weight emulsifier comprising a viscosity building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of ≤ 5.5 or a viscosity-building emulsifier that is at least about 50.0% by weight protein, or both, to make a coarse emulsion; and

b) recovering the coarse emulsion

wherein the coarse emulsion may optionally be homogenized in a homogenizer to produce a smooth emulsion; and

further wherein viscosity building emulsifier makes up about 0.1 to about 4.0 percent by weight of the edible emulsion, with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier.

Claim 15 which is dependent on claim 14 specifies the requirement for homogenization as one of the preferred embodiments. Claim 16, which is dependent on claim 14, claims acidulant added before or after the coarse emulsion is made.

Independent Claim 17 is directed to a food product comprising an edible emulsion that comprises:

a) less than about 85.0% by weight oil;

b) water;

c) about 0.5 to about 12.0 % by weight emulsifier comprising about 0.1 to about 4.0 percent by weight of the edible emulsion of a viscosity building emulsifier selected from the group consisting of:

i) a viscosity-building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of ≤ 5.5 ;

ii) a viscosity-building emulsifier that is at least about 50.0% by weight protein, or

iii) both;

with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier;

- d) insoluble fibers; wherein the insoluble fibers are citrus or non-citrus; and
- e) thickener

wherein the edible emulsion is coarse or smooth; and

wherein the food product has a viscosity greater than about 3,000 centipoise and less than about 150,000 centipoise.

The invention of claim 17 is further defined by the dependent claims which claim, among other things, the type of food product, the amount and type of emulsifiers in a given product, mayonnaise product oil content and properties, and the amount of starch.

Claim 21, which is dependent on claim 17 and is directed to mayonnaise containing egg in combination with sodium caseinate and/or whey protein, is independently patentable.

VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The issue raised in this appeal is primarily one of fact and of the type normally encountered in connection with a rejection made under 35 U.S.C. § 103(a). In particular, the issue is as follows:

Would one of ordinary skill in the art, upon reading

Hercules (EP 0 757 895) in view of Fischer as further evidenced by Lowe (Experimental Cookery, John Wiley and Sons, 2d Ed., p. 271, 1937) and also Schwartzberg.

find it obvious to make a superior edible *oil-in-water* emulsion, a method for making the edible emulsion and a food product comprising the edible emulsion having less than 85 % oil, wherein the claimed low oil products unexpectedly display rheological properties similar to full fat products while they unexpectedly look, taste, and have a mouthfeel similar to that of full fat products, which inventive low fat oil products are superior when compared to conventional like low oil compositions

as claimed in the present invention?

VII. ARGUMENT

The Present Invention is Not Obvious under 35 U.S.C. § 103(a)

The Examiner has rejected claims 1, 3, 4, 8-17, 19-23 and 25 under 35 U.S.C. § 103(a) as being unpatentable over Hercules in view of Fischer as further evidenced by Lowe and also Schwartzberg.

In the rejection, the Examiner maintains, in summary, that Hercules discloses low fat salad dressing made to contain a pectin derivative as a fat substitute.; The dressing formulation starting at line 37 bridging col. 6 and 7 is referenced; Casein is a selected protein for this composition. The Examiner admits that

- 1) "viscosity building" emulsifier is not disclosed in the primary reference;
- 2) homogenizer settings are not disclosed.

To cure the vast deficiencies of the primary reference, Fischer is cited, especially to cure the failure of Hercules to disclose insoluble fibers, although the combination is still deficient as to

- (I) Viscosity,
- (II) viscosity building emulsifier,
- (III) amount of viscosity building emulsifier;
- (IV) the HLB of the emulsifiers,
- (V) the oil droplet size of the composition, and
- (VI) homogenizer use and settings.

Swartzberg is relied upon for HLB. Further, Lowe is relied upon for casein and egg white as emulsifier. According to the Examiner, no unobvious or unexpected result is seen from oil droplet size. It is also appreciated that the settings for the homogenizer are not mentioned, but the Examiner asserts it would be an obvious matter of choice to use one type of colloid mill over another.

Notwithstanding the Examiner's apparent position to the contrary, it is, again, the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

The present invention, again, as set forth in independent claim 1, is directed to a superior edible emulsion comprising:

- a) less than about 85.0% by weight oil;
- b) water;
- c) about 0.5 to about 12.0 % by weight emulsifier comprising a viscosity-building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of ≤ 5.5 or a viscosity-building emulsifier that is at least about 50.0% by weight protein, or both;
- d) about 0.1 to about 1.0% by weight insoluble fibers; wherein the insoluble fibers are citrus or non-citrus; and
- e) thickener

wherein the edible emulsion is coarse or smooth oil-in-water emulsion ; and further wherein said viscosity building emulsifier makes up about 0.1 to about 4.0 percent by weight of the edible emulsion, with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier.

The invention of claim 1 is further defined by the dependent claims which claim, among other things, the type and amount of oil ingredient, the amount and HLB of emulsifiers in mixture, the type of emulsion and droplet size thereof, and the type of thickener or mixtures.

Independent claim 14 is directed to a method for making an edible emulsion comprising insoluble fibers comprising the steps:

- a) mixing, in no particular order,
less than about 85.0% by weight oil,
water,
insoluble fiber, wherein the insoluble fibers are citrus or non-citrus;

thickener and

about 0.5 to about 12.0 % by weight emulsifier comprising a viscosity building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of ≤ 5.5 or a viscosity-building emulsifier that is at least about 50.0% by weight protein, or both, to make a coarse emulsion; and

b) recovering the coarse emulsion

wherein the coarse emulsion may optionally be homogenized in a homogenizer to produce a smooth emulsion; and

further wherein viscosity building emulsifier makes up about 0.1 to about 4.0 percent by weight of the edible emulsion, with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier.

Claim 15, which is dependent on claim 14 and is independently patentable, specifies the requirement for homogenization as one of the preferred embodiments. Claim 16, which is dependent on claim 14, claims acidulant added before or after the coarse emulsion is made.

Independent Claim 17 is directed to a food product comprising an edible emulsion that comprises:

- a) less than about 85.0% by weight oil;
- b) water;
- c) about 0.5 to about 12.0 % by weight emulsifier comprising about 0.1 to about 4.0 percent by weight of the edible emulsion of a viscosity building emulsifier selected from the group consisting of:
 - i) a viscosity-building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of ≤ 5.5 ;
 - ii) a viscosity-building emulsifier that is at least about 50.0% by weight protein, or
 - iii) both;

with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier;

- d) insoluble fibers; wherein the insoluble fibers are citrus or non-citrus; and
- e) thickener

wherein the edible emulsion is coarse or smooth; and

wherein the food product has a viscosity greater than about 3,000 centipoise and less than about 150,000 centipoise.

The invention of claim 17 is further defined by the dependent claims which claim, among other things, the type of food product, the amount and type of emulsifiers in a given product, mayonnaise product oil content and properties, and the amount of starch.

Claim 21, which is dependent on claim 17 and is directed to mayonnaise containing egg in combination with sodium caseinate and/or whey protein, is independently patentable.

In contrast and as already made of record, none of the important and critical limitations set forth in the presently claimed invention are even remotely described in the Hercules in view of Fischer as further evidenced by Lowe and also Schwartzberg references. The combination of references fails to disclose or suggest, among other things, the unique claimed relative amounts of viscosity building emulsifiers and homogenizer settings. The Hercules reference merely discloses a 0 to low fat salad dressing composition with a continuous aqueous phase having a semi-gelled pourable system comprising an amidated galacturonic acid methylester with a degree of esterification below 55% (LMA pectin) to replace part or all of the fat in the salad dressing. Hercules fails to disclose or suggest insoluble fibers, and the modified molecules described in Hercules are not the same as the pectin naturally associated

with the citrus fibers such as Herbacel AQ of Fischer. Accordingly, Hercules is a deficient reference because, among other reasons, it does not disclose or suggest:

- (I) element (d) of claim 1, i.e., insoluble fibers; and
- (II) viscosity-building emulsifier; and
- (III) amount of viscosity-building emulsifier; and
- (IV) homogenizer settings.

Because the pectin of Hercules is different, one skilled in the art would have no reason to combine it with Fischer which disclosed Herbacel AQ dietary fiber which has natural pectin (as opposed to modified pectin) associated with it. Moreover, there is no other common thread which would lead one skilled in the art to combine the references. For example, while Hercules relates to dressings, Fischer does not. So one skilled in the art would have no reason to combine the references and the Office Action has not supplied a reason. While Fischer describes Herbacel AQ for applications where viscosity enhancement or thickening are acceptable as a side effect of dietary fiber fortification, the fact that individual elements may be found somewhere within multiple references, does not constitute a *prima facie* case of obviousness. Accordingly, a *prima facie* case of obviousness has not been shown.

The deficiencies in Hercules are not remedied by Fischer (since it merely discloses citrus fibers) and/or Schwartzberg and/or Lowe. Applicants claim a unique combination of emulsifiers, uniquely combined with other ingredients, to produce a composition having unique properties.

Emulsifier System

The Examiner's position notwithstanding, the emulsifiers presently claimed in Claims 1, 14, 17 and their dependent claims, are not the same as those used in Hercules. Nothing in Hercules even remotely describes any of the limitations set forth in the presently claimed invention. In fact, Hercules teaches away from the present invention by requiring replacement of proteins like egg yolk, egg white, or milk proteins such as caseinate or whey protein with the LMA pectin. See Col. 2, lines 47-54; Col. 4,

lines 36-38; Examples 1-2 at Col. 7-8; Claims 1-17. In contrast, the present invention as claimed requires proteins as viscosity building emulsifier. Accordingly, Hercules teaches away from the present invention and leads to a product with a different sensory perception. The invention should be viewed as a whole rather than picking and choosing elements from a multitude of references. Moreover, the combination of references does not arrive at the emulsifier system of the present invention.

Given that Hercules teaches away from the present invention by replacing proteins with LMA, why would one skilled in the art combine it with Lowe to arrive at the emulsifier system of the present invention? Furthermore, Lowe teaches away from the present invention, especially as it relates to sodium caseinate. Lowe makes reference to casein (not sodium caseinate), and in connection with water-in-oil emulsions. In contrast, the presently claimed invention is an oil-in-water emulsion. See, e.g., Claim 1. Lowe also fails to lead one skilled in the art to use a combination of egg and sodium caseinate, since each is discussed separately for different type of emulsion. Accordingly, Lowe teaches away from the present invention. As such, Claim 21 is independently patentable, in addition to all the claims. Appellants respectfully submit that one skilled in the art would not look to a combination of Hercules and Lowe in order to put together their individual pieces so as to arrive at the unique combination according to the present invention.

In contrast, the present invention differs from the cited art in the requirement that the protein in the oil-in-water emulsion composition be a viscosity building emulsifier. Notably, the presence of the viscosity building emulsifiers has shown (see example 2) that mayonnaise made via this invention has shine or sheen (which was key), firmness, mouth dissipation, and viscosity consistent with real mayonnaise, notwithstanding the fact that about 42% less oil was used. None of the references in any combination discloses the emulsifier mixture presently claimed, all of which is important to achieve the above-described desired rheological and appearance characteristics. As to claims 22 and 23, these claims further define the food product by characterizing mouth dissipation and

product sheen to that which is similar to full fat mayonnaise which typically has about 76% by weight oil.

High Pressure Homogenizer

Claim 15 requires high pressure homogenization and is separately patentable. Claim 15 is specifically supported by Example 1 on pp. 15-16 of the Specification. Claim 15 differs from the cited art in the use of the high pressure homogenizer. In contrast, Hercules does not require high shear in order to obtain its desired texture. See Hercules and col. 4, lines 12-20.

The high pressure homogenizer used according to the present invention is used to activate the insoluble fibers to increase the viscosity of the product. The homogenizer is also used to create texture contrast from coarse to smooth, as well as to reduce oil droplet size. The use of insoluble fibers according to the present invention processed in a HPH allows for partial replacement of starch and gums on reduced oil products such as mayonnaise. The result is a low oil mayonnaise without sticky mouthfeel. This brings low oil mayonnaise in parity to full fat products. The invention is directed to a reduced oil product that unexpectedly has the mouthfeel of a full fat product, as discussed in the Specification at page 4, lines 15-17.

For the reasons mentioned above, none of the secondary references relied on by the Examiner in combination with the primary reference even remotely suggest an emulsion, method and product as claimed. In view of this, it is clear that a *prima facie* case of obviousness has not been made and the 35 USC §103 rejection should be withdrawn and rendered moot.

Objective Evidence of Non-obviousness

Example 2 on pp. 16-17 in the Specification unexpectedly shows that the low oil mayonnaise of this invention looks, tastes and has a mouthfeel similar to that of real (full-fat) mayonnaise and significantly better than conventional light mayonnaise products.

In view of the above, it is again clear that the Examiner has not established a *prima facie* case of obviousness as required under 35 USC §103. When establishing a *prima facie* case of obviousness, it is fundamentally improper to gloss over important and critical claim limitations. The “invention as a whole” must be considered, including all limitations of the claimed invention. *In re Boe*, 184 U.S.P.Q. 38, 40 (C.C.P.A. 1974) (“..., all limitations must be considered and that it is error to ignore specific limitations distinguishing over the references”).

The Court of Appeal for the Federal Circuit has repeatedly held that when making out a *prima facie* case of obviousness, the focus must be on the invention as a whole,

That features, even distinguishing features are “disclosed” in the prior art is alone insufficient. As above indicated, it is common to find elements or features somewhere in the prior art. Moreover, most if not all elements perform their ordained and expected function. The test is whether the claimed invention as a whole, in light of all the teachings of the references in their entireties, would have been obvious to one of ordinary skill in the art at the time the invention was made. 35 U.S.C. 103.

Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1549, 220 U.S.P.Q. 193, 199 (Fed. Cir. 1983).

CONCLUSION

In view of the above, Appellants respectfully submit that a proper rejection under 35 U.S.C. § 103(a) has not been made and the application is in condition to be allowed to issue. Accordingly, reversal of the Final Rejection by the Honorable Board is appropriate and is courteously solicited.

Respectfully submitted,

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VIII. CLAIMS APPENDIX

1. (previously presented) An edible emulsion comprising:

- a) less than about 85.0% by weight oil;
- b) water;
- c) about 0.5 to about 12.0 % by weight emulsifier comprising a viscosity-building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of ≤ 5.5 or a viscosity-building emulsifier that is at least about 50.0% by weight protein, or both;
- d) about 0.1 to about 1.0% by weight insoluble fibers; wherein the insoluble fibers are citrus or non-citrus; and
- e) thickener

wherein the edible emulsion is coarse or smooth oil-in-water emulsion ; and further wherein said viscosity building emulsifier makes up about 0.1 to about 4.0 percent by weight of the edible emulsion, with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier.

3. The edible emulsion according to claim 1 wherein the oil is avocado, mustard, coconut, cottonseed, fish, flaxseed, grape, olive, palm, peanut, rapeseed, safflower, sesame, soybean, sunflower, butter fat, chocolate fat, chicken fat, coconut oil, or a mixture thereof.

4. The edible emulsion according to claim 1 wherein the edible emulsion comprises from about 7.5 to about 85.0% by weight oil.

8. The edible emulsion according to claim 1 wherein the emulsifier is a mixture of emulsifiers comprising from about 0.1 to about 2.5% by weight viscosity-building emulsifier.

9. The edible emulsion according to claim 8 wherein at least one emulsifier in the mixture of emulsifiers has an HLB of greater than about 8.0.

10. The edible emulsion according to claim 1 wherein the edible emulsion is a coarse emulsion comprising oil droplets, further wherein at least about 75.0% of all droplets present have a diameter that is greater than about 2.5 micro-m.

11. The edible emulsion according to claim 1 wherein the edible emulsion is a smooth emulsion comprising oil droplets, further wherein at least about 80.0% of all oil droplets present are less than 10.0 micro-m.

12. The edible emulsion according to claim 1 wherein the thickener is a starch, gum or mixture thereof.

13. The edible emulsion according to claim 12 wherein the thickener is a mixture of starch and gum.

14. A method for making an edible emulsion comprising insoluble fibers comprising the steps:

- a) mixing, in no particular order,
 - less than about 85.0% by weight oil,
 - water,
 - insoluble fiber, wherein the insoluble fibers are citrus or non-citrus;
 - thickener and

about 0.5 to about 12.0 % by weight emulsifier comprising a viscosity building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of ≤ 5.5 or a viscosity-building emulsifier that is at least about 50.0% by weight protein, or both, to make a coarse emulsion; and

- b) recovering the coarse emulsion

wherein the coarse emulsion may optionally be homogenized in a homogenizer to produce a smooth emulsion; and

further wherein viscosity building emulsifier makes up about 0.1 to about 4.0 percent by weight of the edible emulsion, with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier.

15. The method for making an edible emulsion according to claim 14 wherein the coarse emulsion is homogenized in a homogenizer and the homogenizer is pressurized from about 20.0 to about 650.0 bar and at a temperature from about 15°C to about 70°C.

16. The method for making an edible emulsion according to claim 14 further comprising the step of adding acidulant wherein the acidulant is added before or after the coarse emulsion is made.

17. A food product comprising an edible emulsion that comprises:

- a) less than about 85.0% by weight oil;
- b) water;
- c) about 0.5 to about 12.0 % by weight emulsifier comprising about 0.1 to about 4.0 percent by weight of the edible emulsion of a viscosity building emulsifier selected from the group consisting of:
 - iv) a viscosity-building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of ≤ 5.5 ;
 - v) a viscosity-building emulsifier that is at least about 50.0% by weight protein, or
 - vi) both;

with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier;

- d) insoluble fibers; wherein the insoluble fibers are citrus or non-citrus; and
- e) thickener

wherein the edible emulsion is coarse or smooth; and
wherein the food product has a viscosity greater than about 3,000 centipoise and less than about 150,000 centipoise.

19. The food product according to claim 17 wherein the food product is a dressing, soup, sauce, dip, spread, filling or drink.

20. The food product according to claim 17 wherein the food product comprises a mixture of emulsifiers comprising from about 0.1 to about 2.5% by weight viscosity-building emulsifier.

21. The food product according to claim 20 wherein the emulsifier mixture comprises egg when the food product is mayonnaise; and the mixture further comprises sodium caseinate or whey protein aggregates or both.

22. The food product according to claim 21 wherein the mayonnaise comprises less than about 75.0% by weight oil and displays mouth dissipation similar to mouth dissipation of full fat mayonnaise.

23. The food product according to claim 20 wherein the mayonnaise displays a surface shine similar to surface shine of full fat mayonnaise.

25. The food product according to claim 17 wherein the food product comprises 3.8% by weight or less starch.

IX. EVIDENCE APPENDIX

No additional evidence had been submitted.

X. RELATED PROCEEDINGS APPENDIX

Neither the Appellants, their legal representatives nor the Assignee are aware of any proceedings relating to the present Appeal.